IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1015 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAJENDRASINH JAIDEVSINH DABHI

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 1015 of 2004

MR PRITESH L PARIKH for Petitioner No. 1

MR SS PATEL, APP for Respondent No. 1

MR MJ BUDDHBHATTI for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 02/11/2004

ORAL JUDGEMENT

1. Rule. Service of Rule is waived by ld. APP Mr.

SS Patel for respondent No.1 State and service of Rule is waived by ld. counsel Mr. MJ Buddhbhatti for respondent No.2- original complainant. With consent, Rule is fixed forthwith.

2. Heard ld. counsel Mr. Tirmizi for ld. counsel Mr. Pritish Parikh for the petitioner. The Court is aware that the case is instituted on a police report and, therefore, the original complainant practically has no say. However, in the interest of justice, say of ld. counsel Mr. MJ Buddhbhatti for the respondent No.2 -original complainant is considered.

3. The petitioner has approached this Court invoking extra-ordinary jurisdiction of this Court under Sec.482 of CrPC as well as under Articles 226 & 227 of the Constitution of India. The grievance of the petitioner is that request of the ld. counsel appearing for the defence side made before the Presiding Judge to recall some of the witnesses for a limited purpose has been wrongly rejected and ld. Presiding Judge has failed in exercising the discretion in the larger interest of justice.

4. On earlier occasion, considering the submissions made by ld. APP Mr. Patel and ld. counsel Mr. Buddhbhatti for the original complainant, the petitioner was asked to specify the question which the defence counsel intends to ask to the witnesses who are mentioned in the original application exh.94 submitted to the trial Court. Today, ld. counsel Mr. Tirmizi has submitted a list of questions contemplated to be asked to the concerned witnesses, which is taken on record. Ld. counsel Mr. Tirmizi appearing for the petitioner has submitted after going through the relevant depositions recorded by the trial Judge, that Prosecution Witness No.3 examined vide exh.41, Prosecution Witness No.15 examined vide exh.76 and Prosecution Witness No.17 examined vide exh.78, may be recalled and questions mentioned in the list submitted today which is taken on record only may be permitted to be asked to those prosecution witnesses by the ld. counsel appearing for the defence side. So, for this limited purpose, the petitioner may be permitted to recall the concerned witnesses and to ask those questions only to the concerned witnesses.

5. Having considered all relevant aspects including the fact that one Jr. Advocate was appearing in the matter as Sr.Counsel was being unwell and under treatment, some technical errors have been cropped up. Ratio of the decision of the Apex Court in the case of Rajednra Prashad v/s Narcotic Cell, New Delhi, reported in AIR 1999 SC 2292, positively will help the petitioner. Of course, this case relates to an error cropped up because of some error committed by the ld. PP., but the

Apex Court has observed that power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary "for a just decision." The Apex Court has further observed that:-

" A lacuna in prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are proned.

A corollary of any such laches or mistakes during the conducting of a case can not fill up.

Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution can not be treated as irreparable lacuna. No party in a trial can be fore-closed from correcting errors.

If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

6. As the parties have not pressed for detailed reasons, the Court is inclined to allow this petition. So, the impugned judgment and order below Exh.94 dated 15.09.2004 passed by ld. Jt. District Judge & Addl. Sessions Judge, Fast Track Court No.7, Nadiad in Sessions Case No.73/2000 is hereby quashed and set aside and ld. trial Judge is hereby directed to recall Prosecution Witness Nos. 3, 15 & 17, of course it would be proper to recall witness No.15 after examination of witness No.17, for a limited purpose and ld. trial Judge shall permit defence side to ask/put before those witnesses, only those questions as stated in the list of question tendered today before the Court by ld. counsel Mr. Tirmizi. Ld. Counsel Mr. Tirmizi shall see that copy of the list containing questions tendered today before the court is sent to the ld. counsel appearing before the trial Court on behalf of defence side so that he can

ask only those questions to the prosecution witnesses so recalled. No more opportunity to cross-examine the recalled witnesses shall be offered. However, it is clarified that it will be open for the ld.PP to ask questions in re-examination in case of exigency. Directions accordingly.

7. Rule is made absolute to the aforesaid extent.

D.S. permitted.

[C.K. BUCH, J]

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